IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

S. NATHAN & COMPANY, INC.,
NEW HAMPSHIRE FIRE INSURANCE COMPANY,
Petitioners,

v.

RED CAB, INCORPORATED,
FRANK BIRD TRANSFER COMPANY,
Respondents.

No. ———.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

S. Nathan & Company, Inc., and New Hampshire Fire Insurance Company pray that a writ of certiorari be issued by this Honorable Court to review the final judg-

ment of the United States Circuit Court of Appeals for the Seventh Circuit in the above entitled cause affirming the judgment of the District Court of the United States for the Southern District of Indiana, Indianapolis Division, in favor of the respondents.

The opinion of the Circuit Court of Appeals was filed March 10, 1941 (R. 118), and is reported in 118 Fed. 2d, 864. Appellants' petition for rehearing was denied without further written opinion by the Circuit Court of Appeals, on April 9, 1941. (R. 167.)

SUMMARY STATEMENT

This is an action by petitioners to recover for the loss of a quantity of a salesman's samples of jewelry belonging to petitioner S. Nathan & Company, Inc., of the value of $14,267.96, contained in a traveling salesman's trunk or sample case while being transported for hire by respondents, as common carriers of goods for hire, from the railroad passenger depot in the city of Indianapolis to the Claypool Hotel in that city, and to subrogate the petitioner New Hampshire Fire Insurance Company to the cause of action of S. Nathan & Company, Inc., to the extent of the partial payment of $9,000.00 of the loss by the insurer to the shipper.

The shipper was not asked, and did not make any representation to the carriers, respecting the nature or value of the goods to be carried.

No contract, written or oral, was made limiting the liability of the carriers.

No fraud on the shipper's part was found or proven.

The Circuit Court of Appeals held that it was the duty of the shipper, though unasked, to inform the carriers of the value of the goods, and that, having failed to do so, the carriers were not liable as insurers, but were liable only for loss resulting from the carriers' negligence. The negligence of the carriers was not pleaded or relied on.

Petitioners contended that since respondents were common carriers of goods for hire, and as such, for hire, undertook to carry the shipper's goods without making any inquiry respecting the nature or value of the goods shipped, and without contracting to limit their liability, and with no fraud on the part of the shipper, the carriers were liable as insurers for the loss of the goods.

STATEMENT OF THE CASE

The case was tried by the Court without a jury. Special findings of fact (R. 83) and conclusions of law (R. 88) were made and filed by the District Court.

The District Court found the necessary jurisdictional facts of diversity of citizenship and amount in controversy (R. 83); that respondent Frank Bird Transfer Company was engaged as a common carrier of goods for hire in transporting baggage to and from the Union Station in Indianapolis, Indiana, for the public generally, and that respondent Red Cab, Incorporated, held itself out to the public as the operator of, and did operate, the Frank Bird Transfer Company (R. 83-84); that on September 29, 1936, the Transfer Company maintained an office or desk at the Union Station, and had there its agent to receive checks for baggage of passengers on trains arriving at the Union Station, which baggage was to be delivered to

some designated address in Indianapolis. On that day one Jack Teichlauf, a traveling salesman for petitioner S. Nathan & Company, Inc., arrived at the Union Station at Indianapolis, went to the office or desk of the Transfer Company at the Union Station, gave to the agent of the Transfer Company the railroad baggage check for a trunk then in the possession of the railroad company that had transported Teichlauf and the trunk to Indianapolis, and instructed such agent of the Transfer Company to deliver the trunk to the Claypool Hotel in Indianapolis. The Transfer Company demanded $1.00 for its transportation charge, which sum Teichlauf paid to the Transfer Company. The Transfer Company gave Teichlauf a receipt for the payment. The receipt contained no conditions or limitations of value or any agreement respecting the transportation of the trunk. The Transfer Company received the trunk about one o'clock, A. M., September 30, 1936, placed it on one of its trucks, and while hauling it to the Claypool Hotel the driver of the truck was held up by robbers, the trunk was broken into, and its contents were stolen. The trunk contained jewelry consisting of diamonds and semi-precious stones owned by petitioner S. Nathan & Company, Inc., of the value of $14,267.96, all of which were then stolen and thereby lost. (R. 84-86.)

Teichlauf made no statement to respondents respecting what was contained in the trunk. Respondents had no knowledge that the trunk contained a large quantity of jewelry until after the robbery had taken place. There was no marking on the trunk or anything about it to inform respondents that it contained jewelry in a large quantity, or anything of value other than ordinary baggage that would be carried in a trunk by a traveler. Respond-

ents did not know that Teichlauf represented a jewelry concern and he did not so advise them. (R. 86.) The District Court found that it was an established custom and usage of the respondents to make an additional charge and to take additional precautions, including the procuring of further insurance, where the respondents were called upon to transport baggage in excess of $500.00, if respondents were notified that such baggage contained articles of such value. (R. 86-87.) There was no finding, however, nor any evidence, that Teichlauf or the shipper knew, or had any notice, of any such custom or usage.

Petitioner New Hampshire Fire Insurance Company paid petitioner S. Nathan & Company, Inc., $9,000.00 under its policy insuring against such loss to that extent, and is subrogated to the claim against respondents to the extent of that amount. (R. 87-88.)

There was no finding, and no evidence, that Teichlauf or the shipper was guilty of any fraud or made any representation of the value of the contents of the trunk.

There was no finding, nor was there any evidence, that any inquiry was made of Teichlauf or the shipper respecting the value of the goods to be carried.

There was not pleaded or proven or found any written or verbal contract limiting or in any manner relating to the liability of the carriers.

There was no relation of passenger and carrier involved, but instead there was present the relation of shipper and common carrier of goods for hire.

The uncontradicted evidence is that the Transfer Company regularly transported trunks and sample cases of

traveling salesmen, and that it was not the custom of the carriers to make inquiries respecting the value of the contents of the trunks or cases to be carried, and no such inquiry was made of the shipper in this case. (R. 52.)

The evidence was uncontradicted that the trunk containing the property lost was known as a jeweler's trunk to those experienced in the handling of trunks and baggage (R. 61, 62, 63); that the trunk was specially made with special snapping locks (R. 34), and bore a type of mark and insignia used by traveling salesmen on their trunks and sample cases. (R. 66, 67.) A photograph of the exterior of such a trunk is found in the record at page 91.

The District Court stated as its conclusion of law on the special findings that the law was with the respondents (R. 88) and rendered judgment for respondent (R. 88). The District Court filed no written opinion.

JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION

The jurisdiction of this Court rests upon the provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, (28 U. S. C. A., Sec. 347).

The judgment of the Circuit Court of Appeals became final April 9, 1941 (R. 167), upon the overruling on that day of appellants' petition for rehearing, timely filed (R. 122). This petition for certiorari was filed before the expiration of three months after April 9, 1941.

THE QUESTION PRESENTED

The question presented by this petition is this:

Whether the failure of the shipper of goods, unasked, to inform a common carrier of goods for hire of the value of the goods entrusted to it for carriage, not incidental, or in any wise related, to the carriage of the shipper as a passenger, will relieve such carrier of his liability as an insurer and limit the liability of the carrier to loss resulting from the negligence of such carrier, where no representation is made and no fraud practiced by the shipper respecting the nature or value of the goods, and no contract is made limiting the carrier's liability, the goods consisting of jewelry of the value of $14,267.96 contained in a trunk or sample case carried by a traveling salesman of the shipper.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(a) The Circuit Court of Appeals has erroneously decided an important question of local law in a way probably in conflict with applicable local decisions.

The Indiana state courts hold that a common carrier of goods for hire is liable as an insurer for the loss of the property entrusted to him, excepting only loss from an act of God, the public enemy, inherent defects in the goods or the act or default of the owner or shipper; and have not recognized or applied the rule announced by the Circuit Court of Appeals that merchandise contained in a trunk

while being carried by a common carrier of goods for hire who is engaged in carrying trunks containing merchandise, as well as trunks containing personal effects, constitutes any exception to the rule of the carrier's liability as an insurer.

Cleveland, Cincinnati, Chicago & St. Louis R. Co. v. Henry, Admr., 170 Ind. 94, 99, 83 N. E. 710, 712;

American Railway Express Co. v. Rhody, 84 Ind. App. 283, 288, 143 N. E. 640, 642;

Bansemer v. Toledo and Wabash Ry. Co., 25 Ind. 434, 436;

Reid v. Evansville and Terre Haute R. Co., 10 Ind. App. 385, 388.

The Circuit Court of Appeals has erroneously applied to the case of a common carrier of goods for hire the rule applicable only to the case of a common carrier of passengers for hire who carries the personal baggage of the passenger as an incident to the contract for the carriage of the passenger.

(b) The Circuit Court of Appeals has erroneously decided an important question concerning the law of common carriers of goods for hire affecting all common carriers of goods, and affecting great numbers of shippers of goods of large aggregate value, and in every state of the United States.

(c) The question of law decided by the Circuit Court of Appeals has not heretofore been decided by the Supreme Court of the United States nor by any other Circuit Court

of Appeals, and no decision of the State Courts of Indiana, nor any statute, warrants or sustains the decision of the Circuit Court of Appeals in the case at bar.

The true and correct disposition of the case at bar involves a rule of law whose gravity and importance render the decision of the Supreme Court of the United States peculiarly desirable as a court of last resort.

WHEREFORE petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this Court, on a day to be designated, a transcript of the record and of all proceedings in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the court below be reversed; and that the petitioners be granted such other and further relief as may be just and proper.

Dated, Indianapolis, Indiana, June 24, 1941.

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